

**COURT OF APPEALS
DECISION
DATED AND FILED**

JANUARY 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3011

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS OF
TARENCE J.O., A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

v.

JAMES M.O.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM C. GRIESBACH, Judge. *Affirmed.*

CANE, P.J. This appeal by the Brown County Department of Social Services arises from a termination of parental rights jury trial where the jury found that the father, James O., had made substantial progress toward meeting the conditions of the CHIPS order for return of his child. The trial court accepted the jury's verdict and dismissed the TPR proceedings against James. The primary

issue on appeal is whether, pursuant to § 48.415(2)(c), STATS., a failure "to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home" means substantial progress toward each and every one of the conditions or substantial progress considering all of the conditions as a whole. The secondary issue is whether the jury's verdict is inconsistent when it found that the father had made substantial progress toward meeting the CHIPS conditions for return of the child, but then found there was not a substantial likelihood the father will meet the conditions within one year of trial. Because the trial court properly concluded that the statute requires substantial progress toward the conditions as a whole and the verdict is not inconsistent, the order for dismissal is affirmed.

The child, Tarence J.O., had been removed from his home at birth and placed in the custody of the Brown County Department of Social Services because two of his siblings had died under suspicious circumstances while in the care of their mother, Debbie O. The court in the uncontested CHIPS proceeding imposed six conditions in a June 27, 1995, order.¹

¹ The conditions imposed upon James by the disposition order were as follows:

1. James shall cooperate with the Brown County Human Services Department, which includes but is not limited to signing the necessary releases of information.
2. James shall participate in and successfully complete all aspects of individual counseling. He will need to demonstrate the following:
 - a. Insight and resolution of childhood abuse issues which significantly impact upon his ability to effectively parent.
 - b. Address his passive-aggressive tendencies and understand how his passive personality contributed to the deaths of his children.
 - c. Develop assertiveness which can be applied in his relationship with Debbie and in his role as a parent.

(continued)

In the TPR proceeding against both James and Debbie, four special verdicts were submitted to the jury. With regard to Debbie, the jury's verdicts were in favor of the County and the trial court subsequently terminated her

- d. Grieve the deaths of his children.
3. James shall participate in an AODA assessment.
 - a. If James is found to be alcohol- and/or drug-dependent, then he is to successfully complete an AODA program and follow all aspects of treatment. James will need to maintain sobriety and/or abstinence from alcohol and/or drugs.
4. James shall successfully work with a parenting mentor/educator. He shall demonstrate the following:
 - a. Assume equal parenting responsibilities of his child with Debbie.
 - b. Develop and apply skills that meet the developmental needs of his son.
 - c. Apply skills that meet the medical needs of his son and complete apnea monitor training.
 - d. Develop more effective means of speaking/communicating with his son.
5. James shall have supervised visits with Tarence. Because of the seriousness of the family history and the potential risk to Tarence, the Department recommends, prior to any unsupervised visits, that a Multidisciplinary Team assessment be conducted to determine if James has undergone significant changes that will ensure safety and protection to his son. We will look to evaluations conducted by a psychologist and/or psychiatrist, a possible parent-child interactional assessment completed by Dr. Clare Haynes-Seman, reports from the treating counselor(s), and a report from the parenting mentor/educator.

Conditions/Rules Applicable to the mother and father, Debbie and James [O.]:

- a. Debbie and James shall participate in and successfully complete marital counseling. They will need to demonstrate the following:
 1. Improvement in their communication skills and in their ability to make decisions and resolve problems.
 2. Resolve issues from the past that had previously led to separation and violence.
 3. Develop an ability to work together more as a couple and as parents to their child.

parental rights. With regard to James, the jury agreed with the County on three of the verdict questions, finding that the child was placed outside the home for the requisite period and pursuant to a lawful CHIPS order; the Brown County Human Services Department made a diligent effort to provide the court-ordered services; and there was not a substantial likelihood James would meet the court's conditions within one year of the TPR hearing. However, the jury also found that James had demonstrated substantial progress toward meeting the court's conditions for return of Tarence to the home.²

² The verdict read as follows:

1. Has Tarence [O.] been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

Answer: Yes
(Yes or No)

2. Did the Brown County Human Services Department make a diligent effort to provide the services ordered by the court with respect to James [O.]?

Answer: Yes
(Yes or No)

3. Has James [O.] failed to demonstrate substantial progress toward meeting the juvenile court's conditions for the return of the child to the home?

Answer: No Yes-2 No-10
(Yes or No)

4. Is there a substantial likelihood that James [O.] will not meet these conditions within one year after the termination of parental rights hearing?

Answer: Yes
(Yes or No)

In its motion to the trial court for a judgment notwithstanding the verdict, the County argued there was no credible evidence that James had made any appreciable progress on the counseling condition and, therefore, James had not made substantial progress toward meeting the court's conditions for return of Tarence to the home. The trial court denied the motion.

Section 48.415(2), STATS., requires the County to prove that a parent "failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home."³ The County does not dispute there is sufficient evidence, when considered in the light most favorable to the

³ Section 48.415(2), STATS., provides:

(2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving all of the following:

(a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356(2) or 938.356(2).

(b) 1. In this paragraph, "diligent effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.

2. That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.

(c) That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders; *and that the parent has failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.* (Emphasis added.)

verdict, that James had made substantial progress toward complying with the court-ordered conditions as a whole. However, the County urged the trial court, as it does this court, to interpret "conditions" to mean each of the conditions. The County reasons that a parent cannot meet the conditions for return of the child unless all of the conditions are met. In other words, it argues that a failure to meet any one of the conditions would be grounds for termination. The evidence in this case demonstrates that James had not successfully completed all aspects of the counseling condition.

Statutory construction involves a question of law and a reviewing court owes no deference to the trial court's determination. *State v. Grayson*, 165 Wis.2d 557, 563, 478 N.W.2d 390, 393 (Ct. App. 1991), *aff'd*, 172 Wis.2d 156, 493 N.W.2d 23 (1992). Statutory construction begins with the plain language of the statute. *Ahlgren v. Pierce County*, 198 Wis.2d 576, 579, 543 N.W.2d 812, 813 (Ct. App. 1995). The goal is to ascertain the intent of the legislature. *Id.*

Here, the plain language of the statute supports the trial court's conclusion that it means making substantial progress toward the conditions as a whole. It does not say each of the conditions or all of the conditions. Also, the County's construction would jeopardize a parent's rights to a greater extent than authorized under the statute's plain language.

As in most CHIPS cases, the court imposes a number of conditions which are meant to address specific concerns for return of the child. Counsel for James correctly notes that the trial court's order is a plan made of various components or conditions for the child's return. The requirement under § 48.415(2)(c), STATS., recognizes this and views the parent's progress toward these conditions as part of an overall plan. Under the County's interpretation, it

would allow the County to select any one of the conditions as a basis for termination of the parent's rights without taking into account substantial progress on any of the other conditions. In fact, the County recognizes this weakness in its argument by admitting there may be circumstances where the condition is of minor consequence or sequential to some other condition. This court agrees with the trial court that § 48.415(2)(c) does not provide for such an interpretation as the County suggests.

Next, the County contends the jury verdict is inconsistent so as to require a new trial. This court is not persuaded. The questions are separate and distinct from each other. One can be making substantial progress toward meeting the court's conditions, but it may take longer than one year from the TPR hearing to meet those conditions. There is nothing inconsistent with those conclusions. Actually, the last question needs to be answered only if the jury concludes the parent has failed to demonstrate substantial progress toward meeting the court's conditions. Only then does the last question become relevant since the legislature has required a petitioner to show that not only has the parent failed to demonstrate substantial progress toward meeting the court's conditions, but also that there is a substantial likelihood the parent will not be able to meet those conditions within one year from the TPR hearing. For example, the evidence may show that although the parent has not made substantial progress toward meeting the court's conditions, there is a substantial likelihood the parent will meet those conditions within a year from the TPR hearing. Those answers would also not be necessarily inconsistent. The critical question is whether there is sufficient evidence to support the jury's findings. Here, there is.

Because there is nothing inconsistent for the jury to find that James had made substantial progress toward meeting the court's conditions for the child's

return to his home, but that there is a substantial likelihood that it will take James over a year to meet those conditions, the order for dismissal is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

